SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

JULY TERM, 1973

No. 73-87

MADONNA J. POTTER
Petitioner,

v.

STATE PERSONNEL BOARD OF REVIEW
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT:

A. The word "politics" as used in Section 143.41 Ohio Revised Code must be defined as politics in its narrower partisan sense and activities of an employee in the classified service of the State of Ohio that include typing political campaign letters and stuffing envelopes constitute taking part in politics as that term is used in such section. 3

B. Section 143.44 Ohio Revised Code, and Section 143.41 Ohio Revised Code were enacted as part of the same act of the General Assembly (103 Ohio Laws 698) and must therefore be read in *pari materia*. However, in reading such sections vitality must be given to both. Section 143.41 Ohio Revised Code may not be emasculated by equating the end product of a political service (activity) with the "other valuable things" that are allowable as political contributions in Section 143.44 Ohio Revised Code. 8

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C. Section 143.41 Ohio Revised Code prohibits partisan political activity by any member of the classified service of the State of Ohio. The *only* partisan political activities that are permitted to a classified employee are voting as he pleases, freely expressing his political opinions, and contributing money or its equivalents to the party of his choice. ---------- 10

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OPINIONS BELOW

The Ohio Supreme Court rendered no opinion. The Court of Appeals of Champaign County, Ohio issued a written decision on December 8, 1972 (Appendix A, pp. 10-15, Petitioner's Brief) which was not reported. The Common Pleas Court of Champaign County, Ohio issued a written decision on June 30, 1972 (Appendix F, pp. 22-25, Petitioner's Brief).

JURISDICTION

We admit that Petitioner may apply for Writ of Certiorari under 28 U.S.C. 1257(3). However, we deny that this is a proper case for the court to accept.

QUESTION PRESENTED

Whether Sections 143.41 and 143.44, Revised Code of Ohio, (the Ohio equivalent of the Federal Hatch Act) are unconstitutionally vague under the First and Fourteenth Amendments to the Constitution of the United States for the reason that Section 143.44, Revised Code, expressly permits what Section 143.41, Revised Code, expressly prohibits.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the relevant constitutional and statutory provision involved herein is contained in Petitioner's Appendix D, pp. 18-19. The relevant provisions are:

> First Amendment to the Constitution of the United States, Fourteenth Amendment to the Constitution of the United States, Section 143.27, 143.41 and 143.44 of the Revised Code of Ohio.

STATEMENT OF THE CASE

Respondent concurs with Petitioner's Statement of the Case.

ARGUMENT

A. THE WORD "POLITICS" AS USED IN SECTION 143.41 OHIO REVISED CODE MUST BE DEFINED AS POLITICS IN ITS NARROWER PARTISAN SENSE AND ACTIVITIES OF AN EMPLOYEE IN THE CLASSIFIED SERVICE OF THE STATE OF OHIO THAT INCLUDE TYPING POLITICAL CAMPAIGN LETTERS AND STUFFING ENVELOPES CONSTITUTE TAKING PART IN POLITICS AS THAT TERM IS USED IN SUCH SECTION.

There can be no disagreement that Petitioner Potter admittedly typed letters of a political nature and that she volunteered for the work (Appendix A, E & F, Petitioner's Brief). The disagreement herein posed by Petitioner is whether or not the acknowledged acts are permissible.

Respondent has found very little case law construing Section 143.41 Ohio Revised Code (Appendix D, Petitioner's Brief, Page 19). However, the existing decisions all uphold the statute. The only existing cases on point are *Heidtman vs. City of Shaker Heights,* 163 Ohio St. 109 (1955), (hereinafter cited as *Heidtman*) and *Gray vs. Toledo,* 323 F. Supp. 1281 (1971) (hereinafter cited as *Gray*).

Heidtman, supra, speaks to a situation where members of a municipal fire department were circulating a petition for an ordinance. The ordinance concerned the use of a three platoon system in the fire department. Clearly, the firemen there involved were not working for or against a partisan political party, but were voicing their First Amendment Rights to participate in their government.

Justice Stewart pointed out in *Heidtman, supra,* at Page 175 that the word "politics" (used in Section 143.41 Ohio Revised Code (Appendix D, Petitioner's Brief, Page 19) has two different meanings:

> "The word, "politics", has two different definitions. In Funk & Wagnalls New Standard Dictionary (1952), the word, "politics", is defined as (1) the branch of civics that treats of the principles of civil government and the conduct of state affairs; the administration of public affairs in the interest of peace, prosperity and safety of the state; statecraft; political science; in a wide sense embracing the science of government and civil polity; (2) political affairs in a party sense; the administration of public affairs or the conduct of political matters so as to carry elections and secure public office; party intrigues; political wirepulling; trickery."
>
> The first definition above covers the activities of plaintiffs, but the second does not."

The learned Justice went on to explain that the civil service laws were enacted to insure that public employees would be free from obligation to political parties or officials and to prevent those same civil servants from having the power to ingratiate themselves with parties or elected officials. In *Heidtman, supra,* therefore, it was concluded at Page 176 that:

> "Where legislation is silent as to the meaning of a word contained therein, and that word has both a wide and a restricted meaning, courts, in interpreting such legislation, must give such word a meaning consistent with other provisions of the legislation and of *the objective to be achieved thereby.* Under such logic, the word, "politics", as used in Section 486-23 (Revised Code Section

143.41) must be defined as politics in its narrower partisan sense, and therefore, the activities of plaintiffs in circulating the parts of the initiative petition did not constitute taking part in politics as that term is used in the statute." (Emphasis added)

The factual situation in *Heidtman, supra,* is highly distinguishable from the instant case. Here, Madonna Potter was involved in partisan politics; she did not type letters supporting a referendum, but she was engaged in activity directed towards the election of Roger Cloud.

The Court in *Gray v. Toledo* 323 F. Supp. 1281 (1971), relied heavily on *United Public Workers v. Mitchell,* 330 U.S. 75 (1947). *Mitchell, supra,* is still this Courts' basic pronouncement on the constitutionality of the Hatch Act. *Mitchell, supra,* specifically held that Congress has the power to regulate the political activity of Federal employees, that the constitutional guarantees of free speech and association are not absolutes, but must be balanced against the evils of political partisanship in governmental employees, that the Hatch Act does permit some political activity, and that the courts will only interfere with Congress when regulation passes permissible limitation.

Judge Young was not satisfied to base his decision in *Gray, supra,* solely on the pronouncements of *Mitchell, supra,* but rather he traced more recent First Amendment challenges to the Hatch Act and found that the vitality of the Act has been upheld time and again. See eg., *Palmer v. United States, Civil Service Comm.,* 297 F. 2d 450 (7th Cir.), *cert. denied,* 369 U.S. 849 (1962); *Fishkin v. United States Civil Service Comm.,* 309 F. Supp. 40 (N.D. Calif. 1969); *Democratic State Central*

Committee v. Andolsek, 249 F. Supp. 1009 (D. 1966); *Gray v. Macy*, 239 F. Supp. 658 (D. Or. 1965), *rev'd on other ground*, 358 F. 2d 742 (9th Cir. 1966).

The Supreme Court spoke out in *Pickering v. Board of Education*, 391 U.S. 563 (1968). The Court said at Page 568:

> ". . . no general standard could be fashioned in such situations . . . (and) the problem in any case is to arrive at a balance between the interests of the . . . (employee), as a citizen in commenting upon matters of public concern and the interest of the state, as an employer in promoting the efficiency of the public service it performs through its employees." (words added)

Respondent further notes that this pronouncement was stated in *Gray, supra*, 323 F. Supp. at Page 1289, and that its spirit permeates the entire opinion. Further, on the interest of the state, Judge Young stated at Page 1286 of *Gray, supra*:

> "The key concepts are that the promotion, protection and preservation of the efficiency and integrity of the public service constitutes a compelling state interest and that *partisan political activity by civil servants is a direct and viable threat to an efficient public service.*"
> (Emphasis ours)

The scholarly opinion in *Gray, supra*, establishes the validity of Section 143.41 Ohio Revised Code (Appendix D, Petitioner's Brief, Page 19) beyond question. The point was succinctly made in two sentences at Page 1285, to wit:

> "By interpreting the words "political" and "politics" in their partisan sense, R.C. 143.41 regu-

> lates nonprotected political activity and is, therefore, a lawful enactment by the legislature. The statute does *not* prohibit the employees from directly engaging in nonpartisan political activity and expressly preserves their right to express their political opinions freely."
> (Emphasis ours)

Finally, we refer to the two most recent cases in point before the United States Supreme Court, *United States Civil Service Commission, et al. vs. National Association of Letter Carriers, AFL-CIO, et al,* 41 U.S.L.W. 5122 (U.S. June 25, 1973) and *William M. Broadrick, et al., vs. State of Oklahoma, et al.* 41 U.S.L.W. 5111 (U.S. June 25, 1973). In both *Letter Carriers, supra,* and *Broadrick, supra,* political activity prohibition statutes were upheld as being neither unconstitutionally over-broad nor unconstitutionally vague.

The wording of the Ohio Statute Section 143.41 (Appendix D, Petitioner's Brief, Page 19) is very much akin to the Hatch Act and Oklahoma Stat. Ann., Tit. 74, Section 818(7) (Appendix A, *infra,* P. 12):

> "[7] No employee in the classified service shall be a member of any national, state or local committee of a poltical party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his rights as a citizen privately to express his opinion and to cast his vote."

All three statutes prohibit partisan political activity while allowing the civil service employee to freely express his opinions and exercise his right to vote.

Justice White felicitously remarked in *Broadrick, supra,* at page 5113:

> "Words inevitably contain terms of uncertainty and, as with the Hatch Act, there may be disputes over the meaning of such terms in Section 818 as "partisan", or "take part in", or "affairs of" political parties. But what was said in *Letter Carriers,* ante, p. 5131, is applicable here: "there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." Moreover, even if the outermost boundaries of Section 818 may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the "hard core" of the statute's proscriptions and appellants concede as much. See *Dombrowski v. Pfister,* 380 U.S. 479, 491-492 (1965); *United States v. National Dairy Products Corp.,* 372 U.S. 29 (1963); *Williams v. United States,* 341 U.S. 87 (1951); *Robinson v. United States,* 324 U.S. 282, 286 (1945); *United States v. Wurzbach,* 280 U.S. 396 (1930)."

We believe Justice White's words are directly applicable to the instant case. Here, there is no dispute (Petitioner's Brief, Page 4), that petitioner has fallen into the "hard core" of the statutes' prohibition. Applying the *Heidtman* and *Gray, supra,* rationale to the instant case it is clear that Ms. Potter transgressed permissible limits and did perform illegal political activity.

B. SECTION 143.44 OHIO REVISED CODE, AND SECTION 143.41 OHIO REVISED CODE

WERE ENACTED AS PART OF THE SAME ACT OF THE GENERAL ASSEMBLY (103 OHIO LAWS 698) AND MUST THEREFORE BE READ IN *PARI MATERIA*. HOWEVER, IN READING SUCH SECTIONS VITALITY MUST BE GIVEN TO BOTH. SECTION 143.41 OHIO REVISED CODE MAY NOT BE EMASCULATED BY EQUATING THE END PRODUCT OF A POLITICAL SERVICE (ACTIVITY) WITH THE "OTHER VALUABLE THINGS" THAT ARE ALLOWABLE AS POLITICAL CONTRIBUTIONS IN SECTION 143.44 OHIO REVISED CODE.

When Section 143.44 Ohio Revised Code (Appendix D, Petitioner's Brief, Page 19) (G. C. Section 486-26) is read, its title is most helpful: "Abuse of Official Power for Political Reasons Prohibited". Clearly, when this section is read in its proper context it is quite evident that its intent is to prevent a civil service supervisor from removing his subordinates because those subordinates contributed or refused to contribute money or other valuable things to a political purpose.

Section 143.41 Ohio Revised Code, (Appendix D, Petitioner's Brief, Page 19) (G.C. Section 486-24) on the other hand, expressly prohibits any partisan politics, which is to say active campaigning for a candidate for office as opposed to some non-partisan referendum question.

Petitioner would use Section 143.44 Ohio Revised Code, (Appendix D, Petitioner's Brief, Page 19) to emasculate Section 143.41 Ohio Revised Code (Appendix D, Petitioner's Brief, Page 19). However, we believe that it is a long standing tenet of statutory construction that when two laws are read together they should be

interpreted in such a way as to give vitality to both. If Petitioner's interpretation were used it would open the flood gates to political activity in the civil service.

The import of Sections 143.41 and 143.44 Ohio Revised Code (Appendix D, Petitioner's Brief, Page 19) is not merely to prevent the use of political power to obtain campaign contributions in the nature of legal tender or "valuable things". These statutes are also designed to prevent the use of members of the classified service for political purposes. The 55,000 members of State Civil Service would be an awesome political organization at the disposal of the incumbent party were it not for the inhibiting effect of Sections 143.41 et. seq.

Finally, we note that the issue here is *not* that Madonna Potter gave typed letters to the party of her choice, but that she performed services for it, and is therefore in violation of Section 143.41 Ohio Revised Code, (Appendix D, Petitioner's Brief, Page 19).

C. SECTION 143.41 OHIO REVISED CODE PROHIBITS PARTISAN POLITICAL ACTIVITY BY ANY MEMBER OF THE CLASSIFIED SERVICE OF THE STATE OF OHIO. THE *ONLY* PARTISAN POLITICAL ACTIVITIES THAT ARE PERMITTED TO A CLASSIFIED EMPLOYEE ARE VOTING AS HE PLEASES, FREELY EXPRESSING HIS POLITICAL OPINIONS, AND CONTRIBUTING MONEY OR ITS EQUIVALENTS TO THE PARTY OF HIS CHOICE.

The clear import of the wording of Section 143.41 Ohio Revised Code, (Appendix D, Petitioner's Brief, Page 19) cannot be avoided. The Section expressly states:

> "No officer or employee in the classified service of the state . . . (shall) take part in politics other than to vote as he pleases . . . (or) express freely his political opinion".
> (words added)

Further, Section 143.44 Ohio Revised Code, (Appendix D, Petitioner's Brief, Page 19) allows a civil service employee to give money or "other valuable things" to the political party of his choice without fear of losing his job.

There are no sections of the Revised Code that expand the area of permissible partisan political activity; there are no mitigating circumstances allowed anywhere in the code and therefore it is a reasonable interpretation of Section 143.41 and Section 143.44 Ohio Revised Code (Appendix D, Petitioner's Brief, Page 19) that anything outside of the expressly countenanced acts is forbidden to civil service personnel.

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Section 818 of Oklahoma's Merit System of Personnel Administration Act; Okla. Stat. Ann., Tit. 74, Section 818(7) *et seq.*

> "(7) No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his rights as a citizen privately to express his opinion and to cast his vote."